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Don't Increase a Driver's Traffic Ticket Because She Flipped You the Bird

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Jim Chapman, Attorney, Public Agency Training Council

Is a rude hand gesture protected speech for purposes of the First Amendment? The United States Court of Appeals for the Sixth Circuit says, "Yes."

In Cruise-Gulyas v. Minard, 2019 WL 1143852 (6th Cir. Mar. 13, 2019), Plaintiff Debra Cruise-Gulyas filed suit under 42 U.S.C. § 1983 alleging that Officer Matthew Minard, a city of Taylor, Michigan, police officer violated her Constitutional rights. According to her civil complaint, Officer Minard pulled Cruise-Gulyas over for speeding, but he wrote her a ticket for a lesser violation known as

a non-moving violation. As Cruise-Gulyas drove away, apparently ungrateful for the reduction, she made an all-too-familiar gesture at Officer Minard with her hand and without four of her fingers showing. That gesture not make Officer Minard happy. Accordingly, Officer Minard pulled Cruise-Gulyas over again less than 100 yards from where the original stop occurred and changed the ticket to a moving violation-a speeding offense and what counted as a more serious violation of Michigan law.

Thereafter, Cruise-Gulyas sued Minard under § 1983 alleging that he violated her Constitutional rights by pulling her over a second time and changing the original ticket to a more serious violation. Cruise-Gulyas claimed that Officer Minard unreasonably seized her in violation of the Fourth (and Fourteenth) Amendment; retaliated against her because of her protected speech in violation of the First (and Fourteenth) Amendment; and restricted her liberty in violation of the Due Process Clause of the Fourteenth Amendment.

Subsequently, Officer Minard moved for judgment on the pleadings based on the doctrine of qualified immunity, i.e., that he was immune from liability in this suit based upon the doctrine of qualified immunity. The United States District Court for the Eastern District of Michigan denied Officer Minard's motion, reasoning that Cruise-Gulyas could not be stopped a second time in the absence of a new violation of the law, that she had a free speech right to make the gesture, and that the gesture did not violate any identified law. Officer Minard then filed an interlocutory appeal, again arguing that he was entitled to protection from this suit based upon the doctrine of qualified immunity because, even assuming that he had violated Cruise-Gulyas' constitutional rights, those rights were not clearly established at the relevant time.

The Sixth Circuit began its opinion by explaining that qualified immunity protects police officers from personal liability unless they violate a person's clearly established Constitutional or statutory rights. The Sixth Circuit then stated that the rights asserted by Cruise-Gulyas met that standard.

Under the facts alleged in the complaint, Officer Minard violated Cruise-Gulyas' right to be free from an unreasonable seizure by stopping her a second time. The

parties agreed that Officer Minard seized Cruise-Gulyas within the meaning of the Fourth Amendment when he pulled her over the second time. To justify that stop, Officer Minard needed probable cause that Cruise-Gulyas had committed a civil traffic violation or a reasonable suspicion that she had committed a crime. Officer Minard could not rely on the driving infraction to satisfy that requirement. Any authority to seize Cruise-Gulyas in connection with that infraction ended when the first stop concluded.

That left Cruise-Gulyas' gesture as a potential ground for the second stop. But, the gesture did not violate any identified law. In fact, Officer Minard did not even argue to the contrary. Nor did Cruise-Gulyas' gesture, on its own, create probable cause or a reasonable suspicion that she had violated any law. Although it was a crude gesture, Cruise-Gulyas' act was not criminal. Accordingly, the Sixth Circuit found that Officer Minard clearly lacked authority to stop Cruise-Gulyas a second time.

Officer Minard argued that he was, nevertheless, entitled to qualified immunity because no case put him on notice about this fact pattern-that a second stop after a first stop supported by probable cause violated Cruise-Gulyas' Fourth Amendment rights. The Sixth Circuit disagreed and found that Officer Minard missed the point. In making his argument, the Sixth Circuit determined that Officer Minard failed to acknowledge that the second stop was distinct from the first stop and not a continuation of it. At the pleading stage of the litigation, the Sixth Circuit explained that it must accept Cruise-Gulyas' allegations-that Officer Minard stopped her twice-as true. In that light, the Sixth Circuit opined that case law clearly required independent justification for the second stop. So, no matter how Officer Minard sliced it, Cruise-Gulyas' crude gesture could not provide that new justification. Accordingly, the Sixth Circuit agreed with the District Court that Cruise-Gulyas' allegations survived Officer Minard's motion for judgment on the pleadings based on qualified immunity.

The Sixth Circuit reached the same conclusion with regards to Cruise-Gulyas' First Amendment claim. Cruise-Gulyas alleged in her complaint that Officer Minard violated her free speech rights by stopping her the second time in retaliation for her expressive, if vulgar, gesture. To succeed on this claim, Cruise-Gulyas must show that (1) she engaged in protected conduct, (2) Minard took an adverse

action against her that would deter an ordinary person from continuing to engage in that conduct, and (3) her protected conduct motivated Minard at least in part.

The Sixth Circuit stated that precedent clearly established the first and second elements. Any reasonable officer would know that a citizen who raises her middle finger engages in speech protected by the First Amendment. An officer who seizes a person for Fourth Amendment purposes without proper justification and issues her a more severe ticket clearly commits an adverse action that would deter her from repeating that conduct in the future. The Constitution suggests as much by prohibiting unreasonable searches and seizures. And, the Sixth Circuit had previously held that it is clearly established that police action to seize a person is adverse given that the Founders endeavored scrupulously to protect an individual's liberty of movement in the Fourth Amendment. Therefore, an unwarranted police stop is an intrusion on liberty that satisfies the test.

Furthermore, the Sixth Circuit held that Cruise-Gulyas' complaint also met the third element because she alleged in her complaint that Officer Minard stopped her because she made a crude gesture. According to the Sixth Circuit, that allegation counted as a cognizable, clear violation of her speech rights. Accordingly, the Sixth Circuit affirmed the District Court's denial of Officer Minard's motion for judgment on the pleadings, determined that Officer Minard was not entitled to protection from liability in this suit based upon the doctrine of qualified immunity (at least at the pleading stage of the case), and allowed the case to proceed against Officer Minard.

Note: *Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.*

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